Submitted 29th Day
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Affirmed

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 126.

JOHN FORSYTHE, APPELLANT,

vs.

MARK KIMBALL, ASSIGNEE OF THE MUTUAL SECURITY INSURANCE COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED DECEMBER 13, 1873.

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Amt of interest note.

Aff'd
Swayne J. Writ

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1 Pleas in the circuit court of the United States for the northern district of Illinois, sitting in chancery, at the United States court-rooms in the city of Chicago, in the district aforesaid, on Friday, the thirty-first day of October, in the year of our Lord one thousand eight hundred and seventy-three, and of our Independence the ninety-eighth year.

WILLIAM H. BRADLEY, *Clerk.*

JOHN FORSYTHE
vs.
MARK KIMBALL, ASSIGNEE OF THE MUTUAL Security Insurance Company. } In chancery.

Be it remembered that on the second day of May, A. D. eighteen hundred and seventy-three, came John Forsythe, complainant, by his solicitors, and filed in the office of the clerk of the circuit court of the United States for the northern district of Illinois, at Chicago, in said district, his bill of complaint against Mark Kimball, assignee of the Mutual Security Insurance Company, a bankrupt, defendant; and
2 also, at the same time, filed his bond for costs in said entitled cause; which said bond and bill of complaint are respectively in the words and figures following, to wit:

Bond for costs.

Circuit court of the United States, northern district of Illinois.

FORSYTHE
vs.
KIMBALL, ASSIGNEE, &C.

We do hereby enter ourselves security for costs in this cause, and acknowledge ourselves bound to pay, or cause to be paid, all costs which may accrue in this action, either to the opposite party or to any of the officers of this court, in pursuance of the laws of the United States.

Dated this second day of May, A. D. 1873.

GONDY & CHANDLER.

(Endorsed:) Filed this 2d day of May, A. D. 1873. Wm. H. Bradley, clerk.

3 *Bill of complaint.*

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Circuit court of the United States, northern district of Illinois, of the May term, A. D. 1873.

JOHN FORSYTHE
vs.
MARK KIMBALL, ASSIGNEE OF THE MUTUAL Security Insurance Company, a bankrupt. } In chancery.

To the judges of the circuit court of the United States for the northern district of Illinois:

John Forsythe, of Cook County, in the State of Illinois, and a citizen of the northern district of the State of Illinois, brings this his bill

against Mark Kimball, an assignee of the Mutual Security Insurance Company, a corporation created by the laws of said State, and doing business in said district before and at the time it was adjudicated
4 a bankrupt, and which was adjudged a bankrupt under the laws of the United States by the district court for the district aforesaid, and the said Mark Kimball appointed the assignee thereof, and who is now acting as such; and thereupon your orator complains and says, that on the fifth day of January, A. D. 1869, he borrowed from the Mutual Security Insurance Company, a corporation created under and by the laws of the State of Illinois, and doing its business in the city of Chicago, county of Cook, and State of Illinois, the sum of four thousand dollars, ($4,000.00,) for the purpose of purchasing the south half (½) of the northwest quarter (¼) of section twenty-three, (23,) in township twenty-six (26) north, of range fourteen, (14,) west of the second (2nd) principal meridian; and also a tract bounded as follows: commencing at the southeast corner of the southwest quarter (¼) of the north-
5 east quarter (¼) of section fifteen, (15,) in the same township, running thence west along the half-section line ten (10) rods, thence north eighty (80) rods, thence east ten (10) rods, and thence south eighty (80) rods to the place of beginning, as a homestead for his father and mother, and he did, with said money so borrowed, buy and purchase said tracts of land.

And your orator further says that, at his special request, it was arranged and agreed that the title to said land should be conveyed to your orator and his brothers, Andrew Forsythe, Samuel Forsythe, Robert Hugh Forsythe, and David Forsythe; that five notes should be executed by your orator and his brothers, Andrew Forsythe, Samuel Forsythe, Robert Hugh Forsythe, and David Forsythe, each for the sum of eight hundred dollars, ($800.00,) payable in five years, one of which should be signed by each of them, with interest-notes for two
6 hundred dollars ($200.00) each, payable every six months thereafter, for said borrowed money, and to secure the payment thereof by a mortgage on said property, and your orator agreed to be personally responsible for the payment of all of said notes, and, his said brothers not being good for the said sum or any part thereof, the said Mutual Security Insurance Company assented and agreed to said arrangement only because of such promise of your orator.

And your orator further says, that the funds of said company were in the control of J. Y. Scammon at the time of said transactions, and as a further guaranty of the payment of such loaned money it was arranged and agreed that the said notes should be made payable to the order of the said J. Y. Scammon, and be endorsed and guaranteed by him to the said company.

7 And your orator further says that, in fulfillment of said arrangement and agreement, the said company did furnish and loan the said sum of four thousand dollars ($4,000.00) to your orator; and five promissory notes, bearing date January fifth, A. D. 1869, each for the sum of eight hundred dollars, payable in five years, were executed, one by your orator, another by Andrew Forsythe, another by Samuel Forsythe, another by Robert Hugh Forsythe, and the other by David Forsythe; and ten promissory notes bearing date on the same day, each for the sum of two hundred dollars, payable every six months thereafter, were jointly and severally executed by your orator, Andrew Forsythe, Samuel Forsythe, Robert Hugh Forsythe, and David Forsythe, all of which were made payable to the said J. Young Scammon, and they were

assigned and guaranteed by him to said company, and the said
8 sum of four thousand dollars was used for the purchase of said land, and the title was taken in the name of your orator, and the said Andrew Forsythe, Samuel Forsythe, Robert Hugh Forsythe, and David Forsythe, and by them, on the same day, a mortgage was executed, conveying said property to the said J. Young Scammon, to se the payment of all of said notes, which mortgage was on the twelfth day of January, A. D. 1869, recorded in the county of Iroquois, in the State of Illinois, where said lands are situated.

And your orator further says that, on the fifth day of January, A. D. 1869, in like manner he borrowed from the said company the further sum of one thousand dollars ($1,000.00) for the purpose of purchasing the northwest quarter (¼) of the northwest quarter (¼) of section twenty-three, (23,) in township twenty-six (26) north, of range fourteen, (14,) west of the second (2d) principal meridian, for the use of his brother,
9 Robert Hugh Forsythe, and in pursuance of a similar arrangement and agreement then made by and between your orator and the said company, a promissory note bearing date on the fifth day of January, A. D. 1869, for the sum of one thousand dollars, payable in five years, and ten promissory notes of same date for fifty dollars each, payable every six months thereafter during said five years, were executed by the said Robert Hugh Forsythe to the said J. Young Scammon, and by him assigned and guaranteed to said company, and the said sum of one thousand dollars was used for the purchase of the last-described tract of land; a mortgage was at the same time executed by the said Robert Hugh Forsythe conveying said premises to secure the payment of said promissory notes, which was duly recorded January twelfth, A. D. 1869, in the county of Iroquois, in the State of Illinois, where said land was situated.

10 And your orator further says, that before and at the time of such transaction he agreed to be personally responsible for the payment of the said sum of one thousand dollars with interest thereon according to the tenor and effect of said notes.

And your orator further says, that he has since paid the first five of each of said sets of interest-notes from his own pocket, amounting in all to twelve hundred and fifty dollars ($1,250.00,) and that nothing whatever has ever been paid by any of the other makers of said notes; and he further says that the said lands were inadequate security for such loans when they were made, and have been ever since, and that the said Andrew Forsythe, Samuel Forsythe, Robert Hugh Forsythe, and David Forsythe are unable to pay said notes, and have always been pecuniarily responsible and unable to pay the same.

And your orator says that the said Andrew Forsythe, Samuel
11 Forsythe, Robert Hugh Forsythe, and David Forsythe have conveyed all of said lands in fee, subject to the said mortgages, to your orator, so that he is now sole owner of the same.

And your orator further says that the Mutual Security Insurance Company aforesaid is indebted to your orator in the sum of eleven thousand dollars ($11,000.00) for a loss happening on the eighth and ninth days of October, A. D. 1871, upon three policies of insurance, issued to him by said company, before that time and then in force, and that proofs of such loss have been presented to and adjusted by said company, none of which has been paid.

And your orator further says that the said company was, up to and at the time of said loss, solvent and able to pay all its debts, but at that time, by reason of losses then suffered, it became insolvent and

has ever since remained so, and it is now unable to pay its debts,
12 beyond a small pro-rata share, less than ten per cent.

And your orator further says that said company was, on the twenty-seventh day of January, A. D. 1872, adjudicated a bankrupt by the district court of the United States for the northern district of Illinois, and on the said twenty-seventh day of January, A. D. 1873, Mark Kimball was appointed assignee, who qualified and is now acting as such assignee.

And your orator further says that the said Mark Kimball, assignee, as aforesaid, refuses to set off the said promissory notes or any of them against the sum due to your orator, and threatens to sue upon said notes, or to foreclose said mortgages and collect the money due by the terms thereof.

Wherefore, your orator prays that a temporary injunction may be issued against the said Mark Kimball, assignee, as aforesaid, restraining him from collecting the said promissory notes or any
13 of them, or from commencing any suit to obtain judgment thereon, or to foreclose the said mortgages or either of them; that a subpœna may be issued against Mark Kimball, assignee of the Mutual Security Insurance Company, commanding him to appear and answer this bill of complaint according to the rules of this court, and that he be required to answer the same, but not under oath, that being waived, and upon a final hearing that the sum due upon the promissory notes herein described be set off against the sum due to your orator upon the policies of insurance herein set forth, so far as necessary to liquidate and discharge the notes, and that the said assignee be forever enjoined from enforcing or collecting said notes, or any of them, or any part thereof, and that your orator may have such other and further relief as may be equitable.

GOWDY & CHANDLER,
Compl't's Solicitors.

14 (Endorsed:) Filed May 2d, 1873. Wm. H. Bradley, cl'k.

15 Afterwards, to wit, on the 25th day of August, A. D. 1873, came Mark Kimball, by his solicitors, and filed in said clerk's office his answer to said bill, in said-entitled cause, which said answer is in words and figures following, to wit:

Answer to bill of complaint.

In the circuit court of the United States for the northern district of Illinois:

The answer of Mark Kimball, assignee of the Mutual Security Insurance Company, to the bill of complaint of John Forsythe, complainant.

This defendant, saving all advantage of exception to the errors and uncertainties in said bill contained, answering, says:

That he admits that the said The Mutual Security Insurance Company became insolvent on the 9th day of October, A. D. 1871, and that it was adjudicated a bankrupt, and this defendant was appointed assignee thereof, as alleged in said bill, and has received a deed of assignment of its goods and effects, including the notes and mortgages mentioned in said bill, and that he now holds said notes and mortgages and proposes to enforce payment of the same.

He further says that said notes were assigned to said bankrupt company, before its bankruptcy, by one J. Young Scammon, to whom
16 they were made payable, and he denies that the sums of money

mentioned therein were borrowed from the said company by said complainant, but says that said company purchased said notes from said Scammon for a valuable consideration, and he denies that the said loan was made from said company to said complainant, as in said bill alleged.

This defendant further says that he is not informed, and does not know, the purpose of the giving said notes by the said Forsythes, and leaves the complainant to make such proof thereof as he deems material; but he admits that said notes were secured by mortgages upon the land mentioned and described in said bill, and he says that the said mortgagors were the owners thereof. He further says that the said notes were given to said Scammon, and the money borrowed from him by said Forsythes, for their own use, and not for the use or accommodation of said complainant; but whether said complainant agreed to be responsible therefor or not this defendant is not informed, & has no knowledge; and he says that for the purposes of this case it is immaterial whether complainant made such verbal promise or not; and this defendant does not know who paid the first interest-notes, and says that it is immaterial.

17 He says he has seen a deed from the said Forsythes to said complainant, (made since the bankruptcy of said company, and just prior to the bringing this suit,) of the property described in said bill.

And this defendant, further answering, says that he admits the indebtedness of said company to said complainant upon policies of insurance, as in said bill set out, and his refusal to set off the same against the indebtedness of said Forsythes above mentioned, and he prays to be hence dismissed with his costs.

MARK KIMBALL,
Assignee of the Mutual Security Insurance Company,
By WILLIAMS & THOMPSON,
His Solicitors.

JNO. L. THOMPSON,
Of Counsel.

(Endorsed:) Filed August 25, '73. W. H. Bradley, clk.

Afterwards, to wit, on the 11th day of October, A. D. 1873, came said complainant, by his solicitors, and filed in said clerk's office his replication to answer to said bill of complaint in said cause,

18 which said replication is in words and figures following, to wit:

Replication to answer.

United States circuit court, northern district of Illinois.

JOHN FORSYTHE
vs.
MARK KIMBALL, ASSIGNEE, &c. } In chancery.

This repli'ant, saving to himself all benefit of exception to the said answer of the defendant for insufficiency and otherwise, says that he will maintain and prove the allegations of his said bill of complaint, and that the statements are not true, &c.

JOHN FORSYTHE,
By GONDY & CHANDLER,
His Solicitors.

(Endorsed:) Filed Oct. 11th, 1873. Wm. H. Bradley, clk.

Afterwards, to wit, on the 11th day of October, A. D. 1873, in the record of the proceedings of said court in chancery in said-entitled cause, before the Hon. Henry W. Blodgett, judge, appears the
19 following entry, to wit:

JOHN FORSYTHE
vs.
MARK KIMBALL, ASSIGNEE, &C. } In chancery.

Now come the parties, by their solicitors, and thereupon this cause is set down for hearing upon the bill, answer, replication, and proofs and exhibits on file herein, and, after hearing the arguments of counsel, the court, not being sufficiently advised in the premises, takes time to consider.

Afterwards, to wit, on the 31st day of October, A. D. 1873, in the record of the proceedings of said court in chancery in said-entitled cause, before the Hon. Henry W. Blodgett, judge, appears the following entry, to wit:

Decree.

JOHN FORSYTHE
vs.
MARK KIMBALL, ASSIGNEE OF THE MUTUAL Security Insurance Company. } In chancery.

This cause came on to be heard at this term, and was argued by counsel, Messrs. Gondy & Chandler appearing for said complainant,
20 and Messrs. Williams & Thompson appearing for said defendant; and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows, viz: That the said complainant is entitled to a set-off of his said note, signed and executed by himself alone, dated the fifth day of January, A. D. eighteen hundred and sixty-nine, for the sum of eight hundred dollars, ($800.00,) due five years after the date thereof, and payable to the order of J. Young Scammon, and by him endorsed and guaranteed, and now held by the said defendant against the same sum of eight hundred dollars, ($800.00,) due from the said estate of the Mutual Security Insurance Company to the said complainant upon the policies of insurance set out in said bill of complaint; and it is, therefore, ordered that the said defendant set off and allow to said complainant eight hundred dollars ($800.00) so due from said complainant on said note against the same sum due to the said complainant upon said policies of insurance; and that said adjustment and set-off be made as of the date of the entry of this decree. And it is further ordered, adjudged, and decreed, that the said defendant be perpetually enjoined and restrained from enforcing or collecting said note of eight hundred dollars ($800.00) against said defendant. And
21 it is further ordered that a proportionate part of the said interest-notes mentioned and described in said bill as signed by the said complainant and the said Andrew Forsythe, Samuel Forsythe, David Forsythe, and Robert Hugh Forsythe, jointly and severally, be also cancelled and allowed to the said complainant, and that such cancellation and allowance be made upon the basis of the payment of the sum of eight hundred dollars ($800.00) of the principal, (for which said interest-notes represent the interest,) on the date of the entry of this decree. And it is further ordered that the said defendant be perpetually enjoined and

restrained from enforcing or collecting such proportional part of said interest-notes against and from the said defendant. And it appearing to the court that the said complainant is not entitled to a sett-off or allowance of any other of the notes or parts of notes or items of indebtedness mentioned and described in said bill of complaint; it is thereupon ordered, adjudged, and decreed that, as to those remaining notes and items of indebtedness, the said bill of complaint be, and it is hereby, dismissed for want of equity.

And thereupon the complainant excepts to the decree so far as the court refuses to allow any other or greater set-off than said note of
22 eight hundred dollars, and the proportion of said interest-note as aforesaid, and to dismissal of the bill as to the remaining notes and indebtedness, and prays an appeal to the Supreme Court, which is allowed, upon the complainant filing a bond in the sum of six thousand dollars, with security to be approved by the court within twenty days.

23 Afterwards, to wit, on the 31st day of October, 1873, said complainant, by his solicitors, filed in said clerk's office the certificate of evidence in said-entitled cause, which said certificate of evidence is in words and figures following, to wit:

Certificate of evidence.

Circuit court of the United States, northern district of Illinois.

JOHN FORSYTHE
vs.
MARK KIMBALL, ASSIGNEE OF THE MUTUAL Security Insurance Company. } In chancery.

Be it remembered that on the hearing of the above-entitled cause the said complainant offered and read in evidence the deposition and exhibit of John Forsythe, as follows, to wit:

Deposition of Forsythe.

In the circuit court of the United States, northern dist. of Ill. In chancery.

JOHN FORSYTHE
vs.
MARK KIMBALL, ASSIGNEE.

24 STATE OF ILLINOIS,
County of Cook:

The deposition of John Forsythe, of the county of Cook, & State of Illinois, a witness of lawful age, produced, sworn, and examined upon his corporal on the 3rd day of May, 1873, by me, Wm. J. English, a notary public in & for Chicago, in the county & State aforesaid, by agreement of the parties therein, to be used in a certain suit and matter in controversy now pending and undetermined in thed circuit court of the United States, northern district of Illinois, on behalf of said complainant.

JOHN FORSYTHE, the complainant, having been duly sworn, was examined in chief by Mr. Gondy, and testified as follows:

1. Q. What is your name and residence, and are you a party to this suit?

A. My name is John Forsythe. I reside in Chicago, and am the complainant in this suit.

2. Q. Did you borrow any sum of money from the Mutual Security Insurance Company in the year 1869? If so, state when you borrowed the money and the amount.

A. I borrowed the sum of five thousand dollars from said company on or about the 5th day of January, 1869.

3. Q. When was the money to be repaid?

25 A. In five years from the 5th of January, 1869, with interest at the rate of ten per cent. per annum, interest payable semi-annually.

4. Q. What was the purpose or object in borrowing the money?

A. The object in borrowing the money was to pay for a homestead for my father and mother.

5. Q. Can you give the description of the property?

A. The property was situated in the county of Iroquois and the State of Illinois, and was described as the northwest quarter of the northwest quarter and the south half of the northwest quarter of section twenty-three, township twenty-six north, of range fourteen west, of the second principal meridian. Also the following tract of land, to wit: commencing at the southeast corner of the southwest quarter of the northeast quarter of section fifteen, in the same township and range above given; then west along the half-section line ten rods; then north eighty rods; then east eighty rods, and then south eighty rods to the place of beginning; the said last-mentioned tract containing five acres, and being otherwise described as the east five acres of the southwest quarter of the northeast quarter of said section fifteen.

6. Q. What arrangement or agreement did you make with the Mutual Security Insurance Company in regard to the notes or security

26 that was to be executed for the money borrowed?

A. The arrangement that I made was that for four thousand dollars of the money there was to be five notes—five separate notes of eight hundred dollars each. One to be signed by Andrew Forsythe, my brother; one by Samuel Forsythe; one by Robert Hugh Forsythe; one by David Forsythe, and one by myself. Another note, for one thousand dollars, was to be signed by my brother Robert H. Forsythe. The interest-notes on this thousand dollars were to be signed by Robert H. Forsythe, and the interest-notes for the interest on the five notes for eight hundred dollars each were to be signed by Andrew Forsythe, Samuel Forsythe, Robert H. Forsythe, and myself.

7. Q. What security was to be given, if any?

A. A mortgage was to be given to secure the five notes of eight hundred dollars each signed by all four of my brothers named and myself, and a mortgage by Robert H. Forsythe to secure the one thousand dollars being on the separate tract of land—the forty acres of land above described.

8. Q. On which tract was the mortgage by Robert H.?

A. The northwest quarter of the northwest quarter of section twenty-three, (23.)

9. Q. How was the title to be taken to this property by the arrangement that was made?

27 A. The title to the forty-acre tract just described was to be taken to Robert H. Forsythe, but to the remainder of the property to all five brothers of us.

10. Q. Who were the notes to be made payable to?

A. The notes were to be made payable to J. Young Scammon.

11. Q. Was the money furnished?

A. The money was furnished.

12. Q. How was it used?

A. It was used in paying for the land above described.

13. Q. What was the price paid?

A. Five thousand dollars.

14. Q. The amount borrowed was the full price of the land?

A. The full price of the land.

15. Q. Were the notes executed in accordance with the arrangement

A. The notes were executed in accordance with the arrangement.

16. Q. When the notes were executed were they endorsed or assigned by Scammon; and, if so, how?

A. They were endorsed by Scammon and delivered to the Mutual Security Insurance Company.

17. Q. Was any mortgage given?

A. Two mortgages were given to J. Young Scammon, one by Robert H. Forsythe and another by five brothers of us; the one by Rob-
28 ert H. Forsythe on the forty acres, and the one on the other tracts by the five brothers.

18. Q. You have spoken of five brothers. Give the names of the brothers.

A. Andrew Forsythe, Samuel Forsythe, Robert H. Forsythe, and David Forsythe.

19. Q. Why were the notes made payable to Scammon?

A. Because the officers of the company wanted Scammon to take the responsibility of making the loan. He was managing the notes of the company and he was willing to endorse the notes, knowing all the parties, and looking to me to be the responsible party.

20. Q. Did you make any agreement or promise to pay these notes, or any part of them; and, if so, what agreement or promise did you make about it?

A. I agreed with Scammon I would pay the notes and be responsible for them.

21. Q. How much of them?

A. All of them.

22. Q. Has any part of these notes or indebtedness been paid; and, if so, what?

A. There have been five semi-annual instalments of interest paid by me on all of the indebtedness.

23. Q. Has anything been paid by any of your brothers?

29 A. Not anything.

24. Q. To whom did you make the payments?

A. To the Mutual Security Insurance Company.

25. Q. What were the circumstances of your brothers, pecuniarily, at the time the notes were executed and since?

A. They were not pecuniarily able to pay said notes then or any time since.

26. Q. What was the object in making the arrangement in the manner it was?

A. The object in making the arrangement was to induce, if possible, two of my brothers, who were clerks in a bank in Chicago, and received large salaries, to save some of their earnings and to provide a home for father and mother. My brothers, these two especially, would thus feel that they were doing something in assisting father and mother, and not foolishly spending all their salaries.

27. Q. What were your circumstances generally as to pecuniary responsibility at that time?

A. I was able to pay all the indebtedness then and have been since and am now.

28. Q. Whom did you transact this business with; what individual?

A. J. Young Scammon.

29. Q. What was his position in the Mutual Security Insurance Company?

30 A. He was the original getter-up of the company and principal manager of it; of all its affairs.

30. Q. Was he treasurer at that time?

A. I don't remember that fact. He was a director and an officer at that time.

31. Q. Who owns the title to this property, that was purchased with the borrowed money, now?

A. I do.

32. Q. It has been since conveyed to you, has it?

A. Since conveyed to me by my brothers.

33. Q. Did you make any written contract with your father and mother after this money was borrowed and the land was purchased?

A. We made a written lease to my father and mother of the premises purchased with the money, in consideration of love and affection, to be used as a homestead by them for and during the term of their natural lives, and during the natural life of the survivor of them.

34. Q. Have you a copy of that lease, and will you furnish and attach it to your deposition?

A. I have a copy of that lease and will furnish it, and attach it to my deposition as "Exhibit A."

35. Q. Is the Mutual Security Insurance Company indebted to you; and if so, on what, and in what amounts?

31 A. The Mutual Security Insurance Company is indebted to me in the sum of eleven thousand dollars, loss by the fire of October 8th and 9th, 1871; five thousand dollars upon the premises known as 57 South Water street, secured by policy No. 7026, dated January 9th, 1869, renewed by the last renewal, dated January 6th, 1871, No. 12331, for one year from the 5th of January, 1871; also five thousand dollars on premises known as 320 and 322, Superior street, in the city of Chicago, under policy 14753, dated the 19th of September, 1871, for one year; also one thousand dollars on the premises known as No. 189 Indiana street, under policy 8918, dated November 24th, 1869, and renewed November 17th, 1870, by renewal certificate 11992, until the 20th day of November, 1871.

36. Q. Were the losses on the property that you have mentioned total?

A. They were total losses.

37. Q. Were proofs of loss presented to the company under those policies?

A. Proofs of loss were duly presented and approved.

38. Q. Was an adjustment made?

A. An adjustment was made and the amount satisfactory as a total loss.

32 39. Q. What was the condition of the Mutual Security Insurance Company up to the time of the fire of October 8th and 9th, 1871?

A. The company was a solvent company, able to pay all its debts, and had always promptly met all its losses.

40. Q. What effect did the losses happening at that time have upon the company?

A. It had the effect of forcing it into bankruptcy as an insolvent company.

41. Q. Has it the ability to pay in full?

A. It has not.

42. Q. About what rate can it pay?

A. It has paid seven per cent., and can probably pay three per cent. additional to the seven per cent. in final settlement.

Cross-examination by Mr. Thompson:

1. X Q. You say the title to this property that was taken in the name of yourself and brothers is now in you. When did you first apply to your brothers for a conveyance of it?

A. I applied to them on the 20th day of April, 1873.

2. X Q. When the first interest-note became due was it presented to your brothers, to you knowledge?

A. It was not.

3. X Q. To whom was it presented?

A. To me.

33 4. X Q. Did you ask your brothers to refund to you the portion of the money that you had paid at that time or afterwards?

A. I did not.

5. X Q. Did you never have any conversation with your brothers in reference to the indebtedness which they had incurred? If so, give the substance of the conversation.

A. I never had any conversation with my brothers about it.

6. X Q. Neither of them?

A. Neither of them.

7. X Q. They have never spoken to you about it?

A. Never.

8. X Q. What officer of the Mutual Security Insurance Company besides Scammon did you have any conversation with in reference to this loan, if any?

9. X Q. Scammon was the only officer of the company.

10. X Q. Do you know whether the money that paid for this land originally was the money of the company or the money of Scammon?

A. Scammon paid over the money, but whether it was the company's money or Scammon's—that I don't know.

11. X Q. Scammon guaranteed the loan to company, did he not?

A. He endorsed the notes.

34 12. X Q. Was the proposition of making a provision for your father and mother by yourself and brothers, yours or that of either of your brothers?

A. It was my proposition, at the suggestion of Mr. Scammon, who thought that would be a good way to get Andrew and Sam interested, and by that means be the means of trying to induce them to be economical and save some of their salary.

13. X Q. You had some conversation with your brothers before the transaction?

A. Yes, sir; and Andrew prepared the papers.

14. X Q. At the time that it was talked over between you and your brothers, did they say they would do what they could towards paying for the property?

A. They said they would give their notes. They had not anything to pay with, and they would like to feel they were doing something for father and mother; and they were willing to sign the notes and pay them if they were able.

15. X Q. Have you ever drawn a dividend under these policies from the company?

A. I have not.

Re-direct examination by Mr. Gondey:

1. Q. You say you don't know whether this money was Scammon's or the company's. Do you mean by that that you don't know whether the loan was made from the company or Scammon?

35 A. Scammon said he would loan the money from the company, but it was for the company that it was given, to make a loan.

2. Q. You have spoken of your brothers having a salary, and Scammon's suggesting it would be for their interest. What positions were they occupying, and where did they receive a salary?

3. Q. They were receiving salaries, one in the Marine Company of Chicago, and the other in the Mechanics' National Bank of Chicago. One was a teller and the other was assistant cashier.

4. Q. Was Scammon interested in those institutions?

A. Scammon was the president of these institutions.

JOHN FORSYTHE.

Subscribed & sworn to before me this 3rd day of May, 1873.

WM. J. ENGLISH,
Notary Public.

36 "EXHIBIT A."

This indenture, made this first day of January, in the year of our Lord one thousand eight hundred and sixty-nine, between John Forsythe, Andrew Forsythe, jr., and Samuel Forsythe, all of the city of Chicago, in the county of Cook, in the State of Illinois, and Robert Hugh Forsythe and David Forsythe, both of Will County, in the State of Illinois, parties of the first part, and Andrew Forsythe, sen., and Jane Forsythe, his wife, of said Will County, in the State of Illinois, parties of the second part,

Witnesseth that the said parties of the first part, for and in consideration of love and affection, and of the sum of one dollar to them in hand paid, the receipt whereof is hereby acknowledged, have demised and leased to the said parties of the second part all those premises situate, lying, and being in the county of Iroquois, and State of Illinois, known and described as follows, to wit: The south half of the northwest quarter of section twenty-three, (23,) in township twenty-six (26) north, range fourteen, (14,) west of the second principal meridian, together with the buildings and improvements situate thereon. Also, the east five (5) acres of the southwest quarter of the northeast quarter of section fifteen, (15,) in the township and range above written.

37 To have and to hold the said above-described premises, with the appurtenances, unto the said parties of the second part, as and for a homestead, for and during the term of their natural lives, and *and* to the survivor of them for and during the term of his or her natural life.

In testimony whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written.

JOHN FORSYTHE.	[SEAL.]
A. FORSYTHE, JR.	[SEAL.]
SAM'L FORSYTHE.	[SEAL.]
ROBERT HUGH FORSYTHE.	[SEAL.]
DAVID FORSYTHE.	[SEAL.]

In presence of—
GEO. B. QUIGG.

Compared with the original and found to be a true copy Jan. 1st., 1869.

G. B. QUIGG.

Copy of lease of farm in Iroquois County, Illinois, Jany. 1, 1869.

38 STATE OF ILLINOIS,
Cook County, ss:

I, Wm. J. English, a notary public in and for the city of Chicago, county of Cook, and State of Illinois, do hereby certify that on the 3rd day of May, A. D. 1873, by agreement of the parties therein, John Forsythe personally appeared before me at my office in Chicago, Cook County, Illinois, a witness to testify on behalf of the complainant in a certain cause now pending in the circuit court of the United States for the northern district of Illinois, on the chancery side thereof, wherein John Forsythe is complainant and Mark Kimball, assignee, is defendant.

And I do hereby further certify that the aforesaid witness was first duly sworn to testify the truth, the whole truth, and nothing but the truth, in the cause aforesaid, and that the testimony of said witness was reduced by me to writing, and the same subscribed to by said witness in my presence.

That upon the taking of the testimony aforesaid, Mr. W. C. Gond, appeared for the complainant & Mr. Thompson for the defendant.

In testimony whereof I have hereunto set my hand and affixed my notarial seal this 3rd day of May, A. D. 1873.

WM. J. ENGLISH,
Notary Public.

39 (Endorsed:) Opened at the instance of Mark Kimball, the defendant, Aug. 26, 1873. Wm. H. Bradley, clk.

The complainant then offered and read in evidence, without objection, a deed of conveyance showing that Andrew Forsythe, Samuel Forsythe, David Forsythe, and Robert Hugh Forsythe, and his wife conveyed all their right, title, and interest in all the said real estate and premises to the complainant on the 28th day of April, A. D. 1873.

This was all the evidence.

H. W. BLODGETT, *Judge.*

(Endorsed:) Filed Oct. 31, 1873. Wm. H. Bradley, clerk.

Afterwards, to wit, on the 5th day of November, A. D. 1873, said complainant, by his solicitors, filed in said clerk's office his appeal bond in said-entitled cause, which said appeal bond is in words and figures following, to wit:

Appeal bond.

Supreme Court of the United States.

JOHN FORSYTHE
vs.
MARK KIMBALL, ASSIGNEE, &C.

40 Know all men by these presents that we, John Forsythe, Charles V. Dyer, and James D. Wallace, of the city of Chicago,

in the county of Cook, and State of Illinois, are held and firmly bound unto Mark Kimball, assignee of the Mutual Security Insurance Company, a bankrupt, in the penal sum of six thousand dollars, to be paid to the said Mark Kimball, his successors and assigns, to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals and dated this 29th day of October, A. D. 1873.

Whereas the above-named John Forsythe has taken an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled action by the circuit court of the United States for the northern district of Illinois:

Now, therefore, the condition of this obligation is such that if the above-named John Forsythe shall prosecute his said appeal to effect, and answer all costs and damages if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

[SEAL.] JOHN FORSYTHE.

41 Sealed and delivered in presence of—

CHARLES V. DYER. [SEAL.]
JAS. D. WALLACE. [SEAL.]

(Endorsed:) Approved, [Erased:] but not to operate a supersedeas.
H. W. BLODGETT, *Judge.*

(Endorsed:) Filed Nov. 5th., 1873. Wm. H. Bradley, clk.

42 NORTHERN DISTRICT OF ILLINOIS, *ss:*

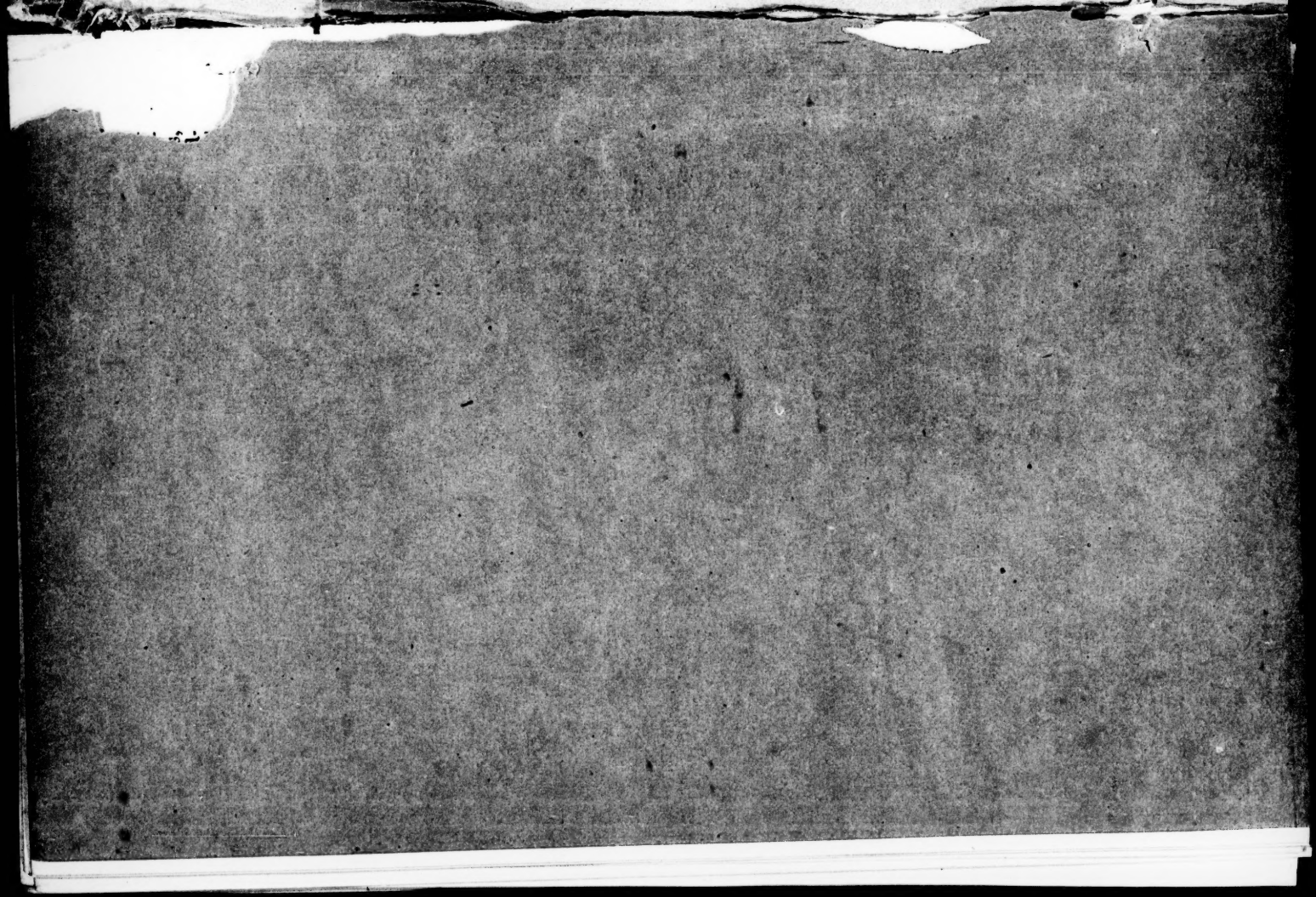
I, William H. Bradley, of the circuit court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true, correct, and complete transcript of the record of all the proceedings had in said court, in said-entitled cause, wherein John Forsythe is complainant, and Mark Kimball assignee, &c., is defendant, as appears from the records of said court remaining in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said circuit court, at my office, in the city of Chicago, in said district, this tenth day of November, A. D. 1873, and of our Independence the ninety-eighth year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

(Indorsement on cover:) No. 126. John Forsythe, appellant, vs. Mark Kimball, assignee of the Mutual Security Insurance Company. N. Illinois C. C. U. S. Filed 13 December, 1873.

C



IN THE

UNITED STATES SUPREME COURT.

OCTOBER TERM, A. D. 1875.

JOHN FORSYTHE,
Appellant,
v.
MARK KIMBALL, Assignee of the MUTUAL SECURITY INSURANCE COMPANY,
Appellee.

Appeal from Circuit Court of the Northern District of Illinois.

ARGUMENT FOR APPELLANT.

W. C. GOUDY,
For Appellant.

CHICAGO:
BULLETIN PRINTING COMPANY, 132, 134 & 136 Monroe St., cor. Clark.
1875.

UNITED STATES SUPREME COURT.

OCTOBER TERM, A. D. 1875.

JOHN FORSYTHE, *Appellant*,
v.
MARK KIMBALL, Assignee of the MUTUAL SECURITY INSURANCE COMPANY, *Appellee.*

Appeal from Circuit Court of the Northern District of Illinois.

ARGUMENT FOR APPELLANT.

The bill of complaint states fully the case, and the deposition of the complainant was the only testimony taken, and that proves the averments of the bill. As there is no controversy as to the facts, it is sufficient to state them briefly, without a complete abstract of the record.

See bill, Record, 2–4.

Deposition, Ib., 8–12.

I.

STATEMENT OF THE CASE.

1. At the request of the complainant, John Forsythe, The Mutual Security Insurance Company, on the 5th day of January, 1869, loaned to him $5,000, to be paid in five years,

with interest at the rate of ten per cent. per annum, payable semi-annually. The object of the complainant in borrowing the money, was to purchase some land as a homestead for his father and mother.

2. The complainant had four brothers and an aged father and mother; two of the brothers were young men, employed in a bank, of which J. Young Scammon was president, and in receipt of salaries, which they were in the habit of squandering. Mr. Scammon suggested to the complainant that these young men might be induced to save their money, if they were placed under obligation to assist in providing a home for their father and mother. For the purpose of accomplishing this object one hundred and twenty-five acres of farming land in Iroquois county, Illinois, were selected, and the $5,000 was borrowed and used to buy the land for such a homestead. The title to eighty-five acres was taken to the five brothers, and to forty acres to one of them. Five notes of $800 each, were prepared, and one was executed by each of the five brothers, and ten interest notes for $200 each, were prepared and executed jointly and severally by the five brothers; to secure these notes a mortgage was executed on the eighty-five acres, by the five brothers in whom the title was to be vested. A note for $1,000, and ten notes for $50 each, were also prepared and signed by Robert H. Forsythe, one of the brothers, and he gave a mortgage to secure them, on the forty acres. Mr. Scammon was the sole manager of the Insurance Company, and made the loan; he took the notes and mortgages to himself, and transferred them to the Company.

3. The complainant not only borrowed the money, but he made an express promise, at the time of the application, to induce it to make the loan, to be personally responsible for the

whole of the debt, and the Company agreed to lend the money only because of such promise. This express promise was not superseded by the execution of the notes or mortgages, or intended to be, but it was repeated at the time they were made.

4. All of these brothers, except the complainant, were pecuniarily irresponsible when the money was borrowed, and continued so afterwards.

5. The complainant paid five of each set of interest notes, amounting to $1,250, as they fell due, and this was all of the interest due prior to Oct. 9, 1871, but nothing whatever was paid by his brothers.

6. On the 9th day of October, 1871, the complainant lost some buildings in the great Chicago fire, and on these he held three policies issued by the Mutual Security Insurance Company, amounting to $11,000. The loss was total and was proved, and the sum of $11,000 agreed upon as the sum due to the complainant therefor, but none of it has been paid.

7. Up to the time of the fire the Insurance Company was solvent, and had paid all losses, but the losses were so great at that time that it became insolvent, and is not able to pay more that ten cents on the dollar of its indebtedness. On the 27th of January, 1872, it was adjudicated a bankrupt, and Mark Kimball was appointed assignee, who is the appellee and defendant below.

8. On the 28th of April, 1873, the complainant's four brothers, at his request, conveyed the land mortgaged to him, and he was vested with the title when the bill was filed.

9. The assignee threatened and proposed to collect the

notes and enforce the mortgages, and refused to allow any set-off, and thereupon the appellant, John Forsythe, filed a bill in the Circuit court of the United States for the Northern District of Illinois, on the 2d day of May, 1873, to compel a set-off, and enjoin the collection of the indebtedness and the foreclosure of the mortgages.

Upon the hearing, the court rendered a final decree allowing a set-off of the one note signed by the complainant, and of one-fifth of the joint and several interest notes executed by the complainant and his four brothers, and refused to allow a set-off to a greater extent, and as to the remaining indebtedness dismissed the bill. Record 6.

The complainant brings the case to this court for review, and presents the question, was he entitled to have relief to a greater extent than allowed by the court below.

II.

ASSIGNMENT OF ERRORS.

1. The Circuit court erred in refusing to set off the whole of the indebtedness to the Mutual Security Insurance Company against the sum due from it to the complainant, on his claim for loss.

2. The Circuit court erred in dismissing the bill as to all of the indebtedness, except one note of $800, and one-fifth of the remaining five interest notes to the Mutual Security Insurance Company.

3. The Circuit court erred in refusing to enjoin the foreclosure of the mortgages on the land belonging to the complainant below, when the bill was filed.

III.

ARGUMENT.

I.

There were mutual debts between the complainant and bankrupt.

Section twenty, of the Bankrupt Act in force when the decree was rendered, provided that, in all cases of mutual debts, the account between the parties should be stated, and one debt set off against the other, and the balance only should be allowed or paid, if the claim in its nature was provable against the estate.

The claim of the complainant for losses by fire, covered by the policies of insurance issued by the bankrupt Insurance Company, was provable against the estate, and it amounted to more than the indebtedness due to the Company on the notes and mortgages described in the bill.

The debts were mutual. The claim of the complainant on his policies was due to him alone from the Insurance Company alone, and it was due before the bill was filed. The only question as to the mutuality of the debts, arises in regard to the indebtedness to the Company. Was the complainant liable for that? If he was, then the parties were the same, and the debts were mutual.

The debt due to the Insurance Company was for money

loaned to John Forsythe, the complainant, at his request. That such loan constituted a cause of action against him cannot be denied, unless there was a contract which waived such liability and substituted other persons as the sole debtors. There was no such contract. The notes and mortgages executed for the loaned money were not the evidence of the contract, but they were, as alleged in the bill, a part execution and fulfillment of the contract. They were not given as the written evidence of the entire contract between the parties, but they furnished the evidence of the liability of the parties and property mortgaged, *in addition* to the liability of John Forsythe. The record shows that it was not the agreement or intention of the parties to waive the cause of action, implied by law, against the borrower of money in favor of the lender; but, on the contrary, the complainant expressly promised to be personally liable for the whole of the indebtedness, and it was only upon this consideration that the Insurance Company could be induced to lend the money. The four brothers of the complainant were not good for the notes signed by them; the land was inadequate security for the debt, because the whole of the principal sum borrowed was equal to the full value of the land mortgaged. The object in taking notes from the complainant's brothers was not to place them as the debtors in place of himself, but it was an arrangement intended for the benefit of these young men themselves, and to enlist them in the habit of saving their earnings, by the belief that they were paying a filial debt to their aged parents. The express promise of the complainant to be personally responsible for the payment of all of the principal and interest was repeated when the notes and mortages were made and delivered, and the Insurance Company parted with its money only upon the faith of

such liability and these promises. He recognized this liability by paying all of the interest for two years and a half, when the indebtedness from the Company accrued to him, and he ceased paying.

Can there be any doubt that the Insurance Company, or its assignee, could successfully maintain an action against the complainant to recover the whole of the $5,000 loaned, and the interest thereon? There can be only one answer.

The court below seems, from the decision made, to have regarded the notes and mortgages as the sole evidence of the entire contract of loaning, and for the payment thereof. In this there was error. There is no rule of law which confines the evidence of such a contract, as was made in this case, to the notes and mortgages. The entire contract was by parol. The notes and mortgages were given in part execution of that contract, and did not merge the prior parol agreement for that reason.

The rule that parol evidence is inadmissible to contradict or vary the terms of a valid written instrument, does not apply to cases where the original contract was verbal and entire, and a part only of it was reduced to writing.

Cobb v. Wallace, 5 Cald. (Tenn.) 539.

Where there is an entire verbal agreement and a note given is only a part of such agreement, the agreement may be proved by parol, notwithstanding such note.

Perry v. Hill, 68 N. C. 417.

Where the whole contract has not been reduced to writing, parol evidence may be received to prove the part omitted.

Hunt v. Adams, 6 Mass. 519.

Burke v. Prentiss, Id. 434.

McCulloch v. Girard, 4 Wash. C. C. 292.

The plaintiff having an equitable interest in certain real estate, with the consent of the legal owner, sold the same to the defendant for a specified sum, the amount due to the holder of the title to be paid to him, and the balance to the plaintiff. The defendant paid the amount for which the land was held, and received a deed—the consideration therein named was the sum paid. On refusal of defendant to pay balance, plaintiff brought action of assumpsit therefor, and it was held that the *parol agreement* of defendant to pay a further consideration, additional to that expressed in the deed, was binding and might be enforced.

Pierce v. Weymouth, 45 N. H. 481.

Although a contract may be provable only by writing, yet, if it be only a part of a more comprehensive transaction, its other parts not required to be in writing may be proved by parol. In such cases, the parol evidence is not for the purpose of affecting the interpretation of the writing, but for the purpose of enlarging the sphere of juridical action, so as to embrace the whole transaction to which the writing belongs, and define the rights growing out of the whole case. If the matters alleged are, for the purposes of the given suit, a proper part of the transaction to be investigated, and the law does not directly forbid such matters to be proved by parol, and the parties have instituted written evidence of only part of the transaction, not including the parts proposed to be proved orally, then the evidence is entitled to be heard.

Miller v. Fitchthorn, 31 Penn. St. 252.

These principles are asserted in the elementary books.

2 Phil. Evid., note, 670.

1 Greenleaf Evid. §284a.

The complainant did not promise that his brothers should pay their notes, nor did he in any way undertake to be responsible for the debt of another person. But the money was loaned to him upon his credit and express promise to pay it; the notes were taken from the brothers in addition to this liability of the complainant. The promise and liability of the complainant were independent; he was not surety or guarantor; an action could be maintained against him, notwithstanding the additional remedy on the notes against those who signed them. These notes no more extinguished the original cause of action than the making of a promissory note for a sum found due on account stated for goods sold; in such case the creditor may sue for goods sold and delivered, or on the note, or both.

If, therefore, John Forsythe was liable in an action at law to the Insurance Company for the amount of money loaned with interest thereon, then he owed a debt to that Company, and it could be set off against the debt which the Company owed him; the debts were mutual.

The fact that the principal sum was not due to the Insurance Company when the bill was filed, does not destroy the mutuality, or prevent the set off by a court of equity, the Company being insolvent, in a case like this.

Drake v. Rollo, 3 Bissell 274.

2. *There were equitable grounds for the set-off by a court of equity.*

In addition to a personal liability of the complainant and his brothers, for the loaned money, the Insurance Company held two mortgages which it could foreclose, and thus enforce the payment of the debt, unless defeated by the set-off. At

the time the bill was filed, the title to the land covered by the two mortgages, was vested in the complainant, subject to the mortgages. If the assignee had proceeded to foreclose, John Forsythe, as the owner of the land, would have been a necessary party defendant. In the course of the proceeding, an account would be taken of the sum due, and a decree rendered therefor, with a provision that unless John Forsythe paid the amount found due, by a specified time, the land should be sold and his equity of redemption foreclosed. In other words, the debt was a charge on complainant's land.

The complainant had his debt of $11,000 against the Insurance Company, which was insolvent and unable to pay. Could he not defend successfully against a bill to deprive him of his land, by a proceeding in equity, and show that the Insurance Company owed him a greater sum than that secured by the mortgages, and thus save his land?

Courts of equity are not confined to cases of set-off at law, but they may and ought to allow them when required by sufficient equitable considerations.

This court in *Sawyer v. Hoag*, 17 Wal. 622, says, speaking of the 20th Section of the Bankrupt act, "This section was not intended to enlarge the doctrine of set-off, or to enable a party to make a set-off in cases where the principles of legal and equitable set-off, did not previously authorize it." This remark implies that it will be recognized in all cases where, the principles of legal or equitable set-off settled by the courts prior to the enactment of the Bankrupt law, did authorize it. Such I understand to be the acknowledged law.

Before the existence of statutes allowing set-off of cross debts or credits in suits at law, courts of equity had jurisdic-

tion of that subject, and were governed by principles of natural equity. Since the power has been exercised by courts of law, equity follows the statute as to all cases coming within them, but as to cases beyond them, the natural principles of equity prevail.

In the case at bar, the right of the assignee of the Insurance Company to foreclose is one purely equitable, and can only be enforced in a court of chancery. In such a proceeding the result would be to fix a debt on the property of John Forsythe. It is true, it would not be a general debt, or the judgment a general one, to be satisfied by execution against all of his goods and lands, but it is, nevertheless, a judgment for a debt chargeable on a particular parcel of land.

Therefore, the claim of the assignee of the Insurance Company is one which will result in a debt, and his remedy is only in equity. This gives to a court of chancery jurisdiction over the subject on the application of Forsythe against the assignee.

In addition to this ground of interference by a court of equity, the Insurance Company is insolvent, so that Forsythe cannot collect his debt against the Company, and unless he is protected from the payment of the amount due on the mortgages on his land he will be irreparably injured.

"Upon the foreclosure of a mortgage, by a bill in equity, the defendant may set off a demand he has against the complainant, which would be a proper subject of set-off in a suit brought by a complainant at law to recover the amount due upon his mortgage. But no such set-off can, in general, be allowed in a foreclosure suit which could not be allowed as a proper subject of set-off in an analogous case in a suit at law

for the recovery of the mortgage debt. Where a defendant has not such a legal right of set-off, he must not only show the existence of a debt due from the complainants in the foreclosure suit, but also that they are insolvent; so that injustice would be done if such set-off is not allowed, and the defendant were left to his remedy against them by a distinct and independent suit; or the defendant must state some other grounds of equity in his cross bill which would have been sufficient to sustain an original bill for a set-off."

Waterman on Set-off, § 390–391.

"If an equitable right of set-off exists while the parties have mutual demands against each other, because the debt due to the party claiming the set-off is so situated that it is impossible for him to obtain satisfaction of such debt by an ordinary suit at law, or in equity to recover the same, the court of equity, upon a bill filed, will compel an equitable set-off of one debt against the other. And the insolvency of the party against whom the set-off is claimed, is a sufficient ground for the exercise of the jurisdiction of the court of equity in allowing a set-off in cases not provided for by the statute, although the demands on both sides are not liquidated by judgment or decree, so as to authorize a set-off upon a summary application by motion."

Ibid, § 395.

Tuscumbia, Courtland & Decatur R. R. Co. v. Rhodes, 8 Ala. 206.

Irving v. DeKay, 10 Paige, 319.

Receivers Globe Insurance Co., 2 Edw. Ch. R. 625.

Gay v. Gay, 10 Paige 369.

Lindsay v. Jackson, 2 Paige 581.

These principles are well discussed in *Lindsay v. Jackson*. The court says:

"There is a natural equity that cross demands should be set off against each other, and that the balance only should be recovered. This was the rule of the civil law, and it is now adopted and preserved as the law of those countries where the principles of the civil law prevail. (Code Nap., lib. 3, tit. 3, § 4; Institutes of Law of Spain, lib. 2, tit. 11, ch. 2, § 6; Van Der Linden's Inst. of Law of Holland, lib. 1, ch. 18, § 4; 2 Bell's Com. on Law of Scotland, ch. 4, § 2, p. 124.) By the common law of England, however, this natural equity was not allowed or enforced in the courts of law, but each party was left to recover his demand in a separate action. As a general rule, the court of chancery followed the rule of law; and after the statute had permitted set-offs to a certain extent, in suits at law, this court also adopted and acted on that principle. But the court of chancery, even before the statute, recognized the principle of natural equity, and acted upon it in cases where the law could not give a remedy in a separate suit in consequence of the insolvency of one of the parties. Thus in *Hawkins v. Freeman*, 2 Eq. Ca. Abr. 10, which was decided by Lord Macclesfield five years before the statute of set-offs was passed, the court of chancery interfered to enforce this natural equity as between the administrator of an insolvent estate and the complainant, between which complainant and the intestate there were mutual demands. The same principle of natural equity was recognized by Lord Chief Justice Hale many years before (see *Chapman v. Derby*, 2 Vern. 1, 17). And at this day, if the court finds a case of natural equity, not within the statute, it will permit an equitable set-off, if, from the nature of the claim or from the situa-

tion of the parties, it is impossible to obtain justice by a cross action. (See *Piggott v. Williams*, Mad. & Gild. R. 95.) Where there are mutual demands between the parties which cannot be set off under the statute, but which a court of equity may compensate or apply in satisfaction of each other without interfering with the equitable rights of any person, the fact that one of the parties is insolvent has frequently been held a sufficient ground for the exercise of the equitable jurisdiction of the court of chancery. (*Vide Lord Lanesborough v. Jones*, 1 P. Wms. 325.) In *Pond v. Smith*, 4 Conn. R. 302, the Supreme court of Connecticut held that the insolvency of one of the parties was a sufficient ground for the interference of a court of chancery to set off mere legal demands against each other, although they were so situated as to be incapable of being set off at law; and that the complainant ought not to be left to pursue his legal remedy against the defendants, when, from their insolvency, no satisfaction of his demand could be thus obtained. And in *Searchet v. Admrs. of Searchet*, 2 Hamm. Ohio R. 320, the Supreme court of Ohio, on a bill in equity, permitted the complainants to set off an equitable balance due to them from their co-partner, against a joint bond given by them to him, although, from the unliquidated nature of their claim, there could be no set off at law. In *Collins v. Farquar*, 1 Litt. R. 153, the Court of Appeals in Kentucky recognized the principle that the insolvency of the defendant will, in equity, give the court jurisdiction to decree a set off of a demand against him, which might be recovered in an action at law, if he was solvent. And in delivering the opinion of the same court, in the case of *Robbins v. Hawley*, 1 Monroe's R. 194, Judge Owsley says: 'Robbins is admitted to be insolvent, and

Dodge must be understood, from the proceedings, to be out of the country, and it will not be denied but that those facts are sufficient, in general, to warrant a court of equity in taking cognizance of a cause, for the purpose of setting off demands, which from a lack of connection, could not otherwise be decreed in a court of equity.' See, also, *Prior v. Richards' Admr.*, 4 Bibb's R. 356, and *Ball v. Townsend*, Litt. Sel. Ca. 325. The same principle is recognized in the law of Scotland, where, in ordinary cases, a debtor is not allowed to avoid the payment of what is liquidated and payable, during a long litigation on an unliquidated counter claim; yet there is an exception to the rule, in case of bankruptcy. For a solvent debtor will not be compelled to pay the liquidated debt, and come in with the other creditors for his illiquid claim; but he may plead compensation. (1 Bell's Law Dict. 258, Art. Compensation.) The general principles of set-off are recognized and authorized by a public statute in that country, as well as here. But the learned commentator on the law of Scotland says: 'The statute is, in no degree, exclusive of the operation of equity naturally falling under its rules, and that the insolvency of a party has always been admitted as a ground for administering an equitable remedy, unknown to the ordinary course of law.' (2 Bell's Con. 127.) In the case of *Simpson v. Hart*, 4 John. R. 63, the court of error, in this State, on appeal from this court, permitted a set-off in a case where it was evident no set-off could have been plead at law, if the defendant had brought his action against the complainant on his judgment, because the two judgments off-set were not between the same parties. Judge Spencer, who delivered the opinion of the court of errors in that case, considers the fact of the insolvency of the defendant a material allegation

in the cause, and puts the decision substantially on that ground.

"It is true that Judge Story, in the case of *Green v. Darling*, 5 Mason's R. 201, refused a set-off in equity, because, by the law of the State where the contracts were made, one judgment could not be set off against the other, under the statute. But it must be recollected he was administering the law of a State which had no court of equity; and as no right of set-off had been declared by the laws of the State, and no court had been organized therein to give a remedy, except in the courts of law, the extent of the remedy showed the extent of the right, as it existed in that State. In page 207 of the report, Judge Story says: 'I do not speak here of cases where distinct equities arise from other sources, but upon the naked equity of distinct and unconnected debts, and independent of any statutable regulation.' He subsequently explains what he means by new or distinct equities. And I think it is pretty evident he does not mean to say that the total insolvency of the defendant might not be a sufficient equity to authorize a court of chancery to interfere, if the contracts had been made in a State where equitable jurisdiction was vested in any of its courts, although he expresses no definite opinion on that question."

The fact that the brothers of complainant released their interest in the land mortgaged to him after the insolvency of the Insurance Company, does not affect the right of set-off.

The proviso of first clause of the bankrupt act provided "that no set-off shall be allowed in favor of any debtor of the bankrupt to a claim purchased by or transferred to him after

the filing of the petition," does not apply to this question. The claim of Forsythe was not purchased at all, but it accrued to him upon the policies of insurance issued to himself, since the loss occurred and the claim was adjusted. The indebtedness arose upon the loan of the money. The notes or mortgages given are not claimed by a debtor against a bankrupt, but the reverse. It is a claim of a bankrupt against a debtor, therefore, the debt of the Insurance Company does not come within the terms of the proviso.

But it may be said that it is against public policy and natural justice to allow one who has a claim against a bankrupt to place himself in the position, as to a debt due to the bankrupt, to enable him to set one against the other. It is not necessary to discuss this proposition to its broadest extent, because the complainant did not acquire a new and independent right with which he had no connection prior to the filing of the petition in bankruptcy. The facts disclosed by the record show, that John Forsythe was the real and responsible party in borrowing the money; that he paid all that had been paid upon the debt; that the title to the property nominally vested in himself and brothers in carrying out the form of the benefit to the father and mother, while the real party in the whole transaction was John Forsythe. When the brothers released by quit-claim deed, their interest in the property, it was no more than equity and justice required of them. They had paid nothing and were pecuniarily irresponsible, while the complainant had paid a part of the debt and was liable for the whole. It was, therefore, only just that they should vest him with the title to the property.

There is no evidence tending to show that the convey-

ance was made by the brothers of the complainant for the purpose of enabling him to make a set-off. On the contrary, the presumption is, that it was made because it was right that the grantors should relinquish any apparent claim that they had to the land, and enable the complainant to protect himself against loss as well as he could.

3. *The complainant was entitled to a set-off of the whole amount due upon the interest notes.*

It appears from the bill and the evidence that ten interest notes were given, under the mortgage for $4,000, each of which was jointly and severally signed by the complainant and his four brothers, so that each of them was liable for the whole amount due according to the terms of the notes. It cannot be denied that John Forsythe, the complainant, was liable in an action at law for the whole amount due upon these notes; yet the court below refused to allow a set-off to a greater extent than one-fifth thereof.

"Under the statute which gives to the plaintiff the right to consider the obligation of his debtors, several as well as joint, in an action against one of several for a joint debt, the defendant may set off a separate debt."

Waterman on Set-off, § 225.
Trann v. Gorman, 9 Porter 456.
Winston v. Metcalf, 7 Ala. 837.
Lewis v. Culbertson, 11 Serg. & R. 48.

A fortiori such set-off must be allowed to the complainant, for, by the terms of the instrument, the debt is several as well as joint. At the time the bill was filed, five of these ten notes were unpaid, together with some accrued interest thereon,

and it was the duty of the court below to have set off the amount due thereon against the debt due to John Forsythe from the Insurance Company.

W. C. GOUDY,

Attorney for Appellant.

Bulletin Printing Co., 132, 134 and 136 Monroe Street, cor. Clark.

United States Supreme Court.

OCTOBER TERM, 1875.

JOHN FORSYTHE,
Appellant,

vs.

MARK KIMBALL,
Assignee of the Mutual Security Insurance Company, Bankrupt,
Appellee.

Appeal from the Circuit Court of the Northern District of Illinois.

BRIEF FOR APPELLEE.

JOHN L. THOMPSON,
Counsel for Appellee.

M'GILL & WITHEROW, PRINTERS AND STEREOTYPERS, WASHINGTON, D. C.

Supreme Court of the United States.

OCTOBER TERM, 1875.

JOHN FORSYTHE, Appellant,

vs.

MARK KIMBALL, Assignee of the Mutual Security Insurance Company, bankrupt, Appellee.

Appeal from the Circuit Court of the Northern District of Illinois.

BRIEF FOR APPELLEE.

In January, 1869, five brothers, Andrew Forsythe, Samuel Forsythe, Robert H. Forsythe, David Forsythe, and John Forsythe, the appellant, borrowed from J. Young Scammon the sum of four thousand dollars, ($4,000,) giving therefor their five separate promissory notes, for $800 each, all payable to Scammon's order. Interest notes were also given, signed by all the brothers jointly and severally. With the money thus obtained the five brothers purchased a tract of land in Illinois, taking the title in their names as tenants in common. At the same time they mortgaged the property to Scammon to secure the notes they had given him.

Robert H. Forsythe also borrowed from Scammon one thousand dollars, ($1,000,) and gave his individual note therefor, with interest notes, all signed by himself, and all payable to Scammon. With this $1,000 Robert bought another tract of land, taking the title in his own name, and immediately mortgaged it to Scammon to secure his notes.

All these securities were transferred by Scammon to the Mutual Security Insurance Company, he becoming liable upon the notes by indorsement. The company became bankrupt in 1872; the appellee was appointed assignee, and found these securities as part of the assets of the company.

As he was about attempting to realize upon them, he was met by the bill of the appellant filed in this case. The bill recites that the loan was made by the insurance company to the appellant, and to him alone; that making the notes and mortgages to Scammon, instead of to the company, was mere matter of form, and that the four brothers joined in the notes and mortgages, and gave their individual obligations only as a matter of discipline, to encourage them to save their money by incurring an indebtedness; that the object of the loan was to procure a homestead for their aged father and mother, and that the appellant, being the only brother of pecuniary responsibility, made all the negotiations, and assumed the entire responsibility of the whole debt of $5,000; that the company was indebted to him in a much larger sum than $5,000, and the four brothers had conveyed to him all their interest in the land, and praying for a decree of set-off, and for an injunction restraining the collection of the indebtedness or any part thereof.

The court below allowed a set-off to the extent of the note for $800, signed by the appellant individually, and also his proportion of the interest notes attached to the four other notes for $800, and dismissed the bill as to the other parts of the claim.

It is true that the company was indebted to the appellant in the sum of $11,000, and it is also true that the appellant agreed with Scammon to pay and be responsible for the debt; but it is submitted that the facts are far from establishing that the contract was solely the contract of the appellant with the insurance company.

1st. The contract was made with Scammon as an indi-

vidual, and the appellant is not liable to the company upon his promise to Scammon. The notes and mortgages were made to Scammon, and this is the best evidence of the contract. The deposition of Forsythe does not establish a loan from the company. He says, on page 8 of the Record, that he borrowed the money from the company; but that is only a conclusion of law. He says (Record, p. 10) that all the negotiations were had with Scammon, and that Scammon was an officer of the company; but when asked in cross-examination who paid him the money, he answers that it was Scammon, and he does not know whether it was Scammon's money or that of the company, (Record, p. 11.) In his re-direct examination he is asked again whose money it was, and he replies that "Scammon said he would loan the money from the company." He also says that the officers of the company required the responsibility of Scammon for the loan, and that Scammon did indorse the notes.

2d. The contract was the undertaking of all the brothers, and the debts are not mutual.

The only evidence of any separate contract made by the appellant touching this loan, (aside from the fact that the appellant was more active in effecting it than his brothers,) is contained in the following question and answer:

"Question 20. Did you make any promise or agreement to pay these notes, or any part of them; and if so, what agreement or promise did you make about it? Answer. I agreed with Scammon that I would pay the notes and be responsible for them."

This is every syllable of evidence of the fact that the contract was really the contract of the appellant, more than that of the other brothers. He says, to be sure, in general terms, that he borrowed the money from the company, and he may be honest in his conviction that such was the case, but the only *fact* he states is that quoted above. His pecuniary responsibility may be an argument upon the

point that, without his individual promise, the money would not have been obtained, but it is nothing more.

There was no repetition of the promise to pay. It was made only once, and in the terms given in the above answer. This promise could have no greater or other effect than to make him a surety for the debts of his brothers.

3d. The appellant was only surety for the indebtedness of his brothers, and the debts which are sought to be set-off do not exist in the same right. The liability of the appellant for this indebtedness of his brothers is exceedingly doubtful, whether we regard him as surety or an original promisor. The contract is expressed in the notes and mortgages, and parol evidence of another contract is of doubtful competency. But whether competent or not for the purpose of charging John Forsythe, the appellant, with liability to Scammon, it cannot be contended that it is competent to charge or affect the contract of the other brothers. Their contract remains; and if the liability of the appellant exists at all, it is only collateral to the undertaking of his brothers.

Scammon had, first, the liability of the makers of the the notes, next, the land which was mortgaged as security, and lastly, if it exists at all, the personal responsibility of the appellant. It is now proposed by the appellant that the liability of the principals shall be extinguished and the mortgage security lost by the set-off of the debt of a surety.

It may be true, as argued by the counsel for appellant, that parol evidence may be admitted when the written evidence does not contain all the contract. In such cases oral evidence may supplement the written, but that is not this case. To admit the evidence by which the appellant seeks to make himself a principal, would change and alter the terms of the contract as they have been reduced to writing by the parties. But, however that may be, the evidence falls far short of showing the liability of the appellant to be other than collateral to that of his brothers. Whatever evidence is admitted, the obligations of the four brothers

remain, and it is not in the power of the appellant to extinguish them by setting off his own private indebtedness.

It is also decided in Illinois, the State in which this contract was made, that a joint and several debt cannot be set off against separate indebtedness of one of the parties. (Lemon *v.* Stevenson, 36 Ill., 49.)

This seems to dispose of the claim that all the interest notes should be canceled, upon the ground that the appellant is jointly and severally liable upon them.

4th. There is no equity in the claim of the appellant for a set-off, which calls for the interposition of a court of equity.

This is one of the many bills which were filed in the northern district of Illinois for the purpose of paying indebtedness to insurance companies rendered bankrupt by the fire in Chicago, by the set-off of policies of insurance. Those policies were at a great discount, and could be purchased for the merest trifle. Set-offs were attempted of purchased policies, and, also, in some instances, as in this case, where the debtor was originally the owner of the policies.

Equitable considerations in every conceivable form were urged upon the court, and some of the cases have reached this court. With the exception of those cases in which the indebtedness was strictly mutual, and existed before the insolvency of the companies, it is not known that any set-offs have been allowed. None of the equities claimed for set-offs, such as insolvency, suretyship, &c., have been successful, and it is certain that none have thus far succeeded in this court.

In Gray *v.* Rollo, 18 Wall., 629, Mr. Justice Bradley, speaking of the right of set-off claimed in that case, uses the following language:

"If it exist at all, it must be on some general principle of equity recognized by courts of equity in cases of set-off, which, if it exist, may be considered applicable under an equitable construction of the act. (Bankrupt Act.) But we can find no such principle recognized by courts of equity in England or this country, unless in some excep-

tional cases, which cannot be considered as establishing a general rule.

This remark was made after Mr. Justice Miller had said, in Sawyer *v.* Hoag, 17 Wall., 610, in speaking of the section of the bankrupt act relating to set-off:

"This section was not intended to enlarge the doctrine of set-off, or to enable a party to make a set-off in cases where the principles of legal and equitable set-off did not previously authorize it."

In the case at bar the facts, when put in the most favorable light for the appellant of which they are susceptible, set forth no special equity in his favor. The scheme for inducing the brothers to save their money, and at the same time to provide a home for their parents, however commendable it may be, or by whomsoever it may have been devised, is of no importance or significance in determining the question of the right of set-off, Whatever may have been the motive of the brothers in incurring the obligations, they made them, and that is all that is important or competent to be considered in this case. We understand, however, that the principal ground upon which this set-off is placed is the fact that the appellant, John Forsythe, the only pecuniarily responsible brother, promised Scammon to pay and be responsible for the debt. Does this fact, even if we suppose the promise to be made to Scammon as an officer of the company, and not to him as an individual, create an equity in his favor which will authorize and justify a subversion of the simplest rule of the law of set-off, as well as the plain provision of the statute, both of which require the debts to be mutual, and to exist in the same right?

The appellee, by the well-settled rule in this court, is the representative of the creditor as well as of the company; and have the creditors no rights? There is no pretense that this promise was made by the appellant to Scammon with any view to a set-off of his policies of insurance in case of loss. The transaction took place in 1869, when the company was

perfectly solvent, and long before any loss had occurred by which the company became indebted to the appellant. We fail to discern any equity which can allow the discharge of this indebtedness with the indebtedness of the company to the appellant. The appellee finds in the assets of the company these notes and mortgages of the Forsythe brothers. He cannot discover that there is any indebtedness from the company to either of the four, and he therefore proposes to collect them for the benefit of the creditors. He knows that the statute does not in terms allow any set-off except of mutual debts, and he knows there are no mutual debts to cancel these claims. The appellant, however, informs him that, although there are no mutual debts to be set off, there are equitable considerations, by means of which these obligations of the brothers as well as the mortgage security may be extinguished and discharged. Those equitable considerations consist of the promise made by a comparative stranger to become responsible for the debt, and that person holds a debt against the company. The debts of the brothers and the security are thus very easily disposed of. Courts of equity in England or in this country have not as yet established a rule by which such equitable considerations can avail for purposes of set-off.

After the insolvency and bankruptcy of the company the four brothers conveyed all their interest in these lands to the appellant. This acquisition of the only interest in this question which he possesses is open to the criticism that it is late. Except for his ownership of the land he would have no right to be heard, for he has been allowed a set-off of all of his own individual indebtedness. This proceeding is simply an attempt to purchase this land with the depreciated policies of this bankrupt company. The mortgages being of an amount equal to the value of the land, the brothers were, of course, willing to convey it subject to those mortgages. The appellant was, of course, willing to take it if he could pay the mortgages with his insurance policies. We respectfully submit that the court below allowed the appellant all that he can properly ask in

the way of set-off, and that the obligations of the brothers and the mortgage security should be allowed to the creditors, who are sorely in need of them, and whose "equitable considerations" outweigh any that have been suggested for the appellant.

Respectfully submitted.

JNO. L. THOMPSON,
Counsel for Appellee.

NOTE. The counsel for the appellee having kindly submitted to me the proof-sheets of his argument, with his consent I append this note.

I had supposed there could be no difference of opinion as to the facts, but it seems that such a difference is the principal, if not the only one. It is not necessary when the record of the bill and only deposition is so short to repeat the facts, but the attention of the court is invited to the record.

Counsel for appellee says the money was borrowed from Scammon; I say it was from the insurance company. The business was done with Scammon, but he was the managing officer of the company and acted for it in making the loan; there was no pretense of a loan by Scammon—for some unexplained reason he took the notes in his own name and assigned them to the company.

Counsel for appellee says that the money was borrowed by the five brothers, and the appellant promised as surety to pay the debt or notes of the whole of them. I say appellant borrowed the money, and made a promise to pay it before and when the notes and mortgages were given; that appellant was the original and main debtor; and that the brothers joined in the notes for a special purpose consistent with the full original liability of the appellant—there was no surety.

Counsel for appellee says that the bill seeks to cancel the liability of the brothers without payment of their notes. The bill asks an injunction against a foreclosure of the mortgages on the land solely owned by appellant and

against a collection of the debt, upon the ground that the debt has been satisfied. If the appellant had paid the whole indebtedness in money no one would deny the right to relief; if the brothers were still liable, it would be to the appellant and not to the insurance Company. There is no difference between a payment in money or by a legal set-off.

The facts of this record bring the case within the rules for both legal and equitable set-off, and no enlargement of them is now asked.

W. C. GOUDY,
Attorney for Appellant.